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No. 82-193

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Julia McCain Lampkin-Asam, Ph.D.
Appellant

vs.

District Court of Appeal, Third District of Florida; Supreme Court of Florida; State of Florida; Miami Daily News, d/b/a/ The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King
Appellees

On Appeal from District Court of Appeal, Third District of Florida

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Julia McCain Lampkin-Asam, Ph.D.
Appellant, Pro Se
2243 Gorham Avenue
Ft. Myers, Florida 33907

PARTIES TO THE PROCEEDING

Julia McCain Lampkin-Asam, Ph.D. Appellant, (Plaintiff, Appellant and Petitioner below).

Miami Daily News, Inc., a Florida Corporation, d/b/a/ The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King, Appellees, (Defendants, Appellees, and Respondents), Attorney Mr. Joseph P. Averill

State of Florida

Hon. Governor Daniel Robert Graham

Attorney General, Jim Smith

The Supreme Court of Florida

District Court of Appeal, Third District of Florida

Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

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No. 82-193

IN THE

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OCTOBER TERM, 1982

Julia McCain Lampkin-Asam, Ph.D.
Appellant

vs.

District Court of Appeal, Third District of Florida; Supreme Court of Florida; State of Florida; Miami Daily News, d/b/a/ The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King
Appellees

On Appeal from District Court of Appeal, Third District of Florida

Brief Opposing Motion to Dismiss or Affirm

This Appellant's Brief is opposing the Appellee's Motion ...to Dismiss or Affirm because substantial federal question exists

whereby a new state law, Florida Constitution (1980), Article V, section 3(b)(3) is repugnant to the U.S. Constitution, specifically "due process" of the 5th and 14th Amendments to the U.S. Constitution and "equal protection" of the 14th Amendment to the U.S. Constitution when the Appellant does not have access to the highest court of the state, The Supreme Court of Florida to decide a federal question (whether Dr. Asam is a public figure and actual malice is shown in the constitutional sense of the First Amendment to the U.S. Constitution). The Supreme Court of the United States can take jurisdiction under 28 U.S.C. 1257(2). The Appellant respectfully requests the Supreme Court of the United States to take original jurisdiction of the instant case and decide on the merits of the case since Dr. Asam is not a public figure and the said statements (quoted p. 43 of Appellant's Jurisdiction Statement) are libelous per se.

The Appellant respectfully requests the Supreme Court of the United States to take original jurisdiction or remand to the lower circuit court for a jury. See 28 U.S.C. section 2106).

STATEMENT

The Appellant adheres to the Questions Presented, Tables of Authorities, Constitutional Provisions and Statutes Involved, Statement of the Case, Substantiality of the Questions, Conclusion and Appendix of the Jurisdictional Statement Brief by the Appellant, docketed Aug. 4, 1982 as 82-193. This Brief Opposing Appellee's Motion...to dismiss or affirm is a rebuttal brief.

ARGUMENT

On p. 2, paragraph no. 1, the Appellee's Brief, the Appellee incorrectly uses Rule 16(a) as a grounds to dismiss because the Appellee failed to answer to 28 U.S.C. 1257 (2), concerning a new Florida Statute, Florida Constitution, (1980, Article V,

section 3(b)3 that is repugnant to the U.S. Constitution because the Appellant did not have access to the highest court of Florida (Supreme Court of Florida).

On p. 2 paragraph 2, of Appellee's Brief, Rule 16(b) is not applicable since substantial federal questions sought to be reviewed (see Jurisdictional Statement, Questions Presented by Appellant), were timely presented below at the circuit court and appellate levels. See pp. A-31-A-33, Appendix of the Jurisdictional Statement of Appellant for Complaint showing the question of the First Amendment to the U.S. Constitution was raised from the beginning in the circuit court. See the Record p. 1907, "Motion for Re-Hearing or Set Aside the Summary Final Judgment", dated Oct. 17, 1980, which implies lack of "due process" (5th and 14th Amendments to U.S. Conatitution) since the circuit court should have had a jury trial. This Record p. 1907 con-

flicts with p. 13 of Appellee's brief, 2nd paragraph on due process.

Also see quotes from Appellant's brief in Appendix pp. A-2-A-9 of this brief showing the question of a jury trial was before the intermediate appellate court, District Court of Appeal, Third District of Florida.

On p. 2, paragraph 4, Rule 16(c) in the Appellee's Brief, the statement,

..."the decision of this cause depends are so unsubstantial as to not need further argument."

is <u>false</u> because substantial federal questions do exists (see Questions Presented in Jurisdictional Statement of Appellant). The constitutional question of "actual malice" according to the <u>New York Times Co. v. Sullivan</u>, 376 U.S. 254, 84 S Ct. 710, 11 L. Ed. 2d 686, (1964), was not considered by a jury when enormous evidence is in the record showing actual malice by the Miami News reporter (see pp. 25-35 of the Jurisdictional Statement by Appellant). Further,

the worse constitutional infringement, an abuse of the 1st Amendment to the U.S. Constitution, was the creation of facts by the Miami News' attorney, Mr. Averill, by perpetrating a fraud on the court to believe Dr. Asam was in a public debate when he made no reference in the record to where any public debate had taken place (Appellee's Brief, reprinting Appellant's brief pp. A-22-A-23 showing that at the state level, appellate court was notified of Mr. Averill's fradulent behavior). For this reason alone the public figure issues should be reversed that Dr. Asam is not a public figure since she has not been in a public debate. (Also see pp. 18-19 of the Jurisdictional Statement of Appellant, discussing and quoting the false statements made by Mr. Averill to create false facts, making Dr. Asam to appear as a public figure after the Miami News fabricated the statement attributed to Dr. Dunning. Facts created by opposition

attorney are not due process.

On p. 8 of the Appellee's Brief concerning "the trial court had not accorded due deference to her constitutional rights", (see record pp. 1905-1906, "Motion for reconsideration of Order on "Public Figure Issue", dated Oct. 1, 1980 and Record pp. 1907-1908, discussed p. 4 of this brief.

Page 8 of Appellee's brief states,

> "At no point did she suggest to the Florida Supreme Court that the trial court or the intermediate appellate court failed to respect her constitutional rights".

is false (see p. A-1 of this brief and also in the Jurisdiction Statement by Appellant, p. A-12), quoted here,

> "The decision (2) expressly construes a provision of the state or federal constitution."

See Axelrod v. Califano, 357 So 2d 1048, 1051, (Fla. 1st DCA 1978), which states,

> "Summary judgment should be sparingly granted so as not to infringe upon the constitutional right to a jury trial."

This Florida case conflicts with Mr. Averill

on p. 12, last paragraph of his Appellee's brief on the 6th Amendment to the U.S. Constitution.

This instant case should not be dismissed or affirmed on some legal technicality when such a gross miscarriage of justice has already been shown by the Florida Courts in infringing on the Appellant's U.S. Constitutional rights. To give another example see Lampkin-Asam v. Miami Daily News, Inc., 408 So 2d 666, (1. Constitutional Law 90.1(5) and note this is from the first footnote by Judge Pearson. p. 667. The point is that the words "almost paranoical" is taken out of context from the Miami News article and if one was to read the article there are no facts in the editor's column justifying this statement. This is abuse of the First Amendment rights of Dr. Asam, first by the Judge on p. 667, and then by whoever wrote the keys to p. 666. The Appellant hopes th[illegible] Supreme Court of the United States will

accept jurisdiction and the Appellant will be allowed to write a merits brief. Oral argument is requested so that the facts and law in this case can be understood. Mr. Averill should answer at oral argument why he fabricated facts in this case to make Dr. Asam appear as a public figure with no reference in the record; for example, stating that Dr. Asam was in a public debate when she was never in a public debate. (See p. 6 of this brief).

Judge Pearson failed to consider fabrication which is a jury question but he claimed if facetiously stated, OK; however, record indicates fabrication by reporter, (see pp. A-11-A-13, this brief, and p. 49 of Jurisdictional Statement Brief of Appellant).

> "She is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her doctorate from George Washington University, but I suspected they gave her the degree to get rid of her." (Miami News, Oct. 23, 1973).

These statements have "murdered" a meritorious cancer research project and professional career of the Appellant, Dr. Asam,

since the cancer research project has been blocked for almost a decade. There is no doubt about it that substantial federal questions exists (see Questions Presented in Jurisdictional Statement by Appellant).

CONCLUSION

The Appellant adheres to the Conclusion articulated in the Jurisdictional Statement. The Supreme Court of the United States should take jurisdiction under 28 U.S.C. sec. 1257(2), 28 U.S.C. sec. 2106, 28 U.S.C. sec. 1343(3), and 42 U.S.C. sec. 1983. The Summary Judgment should be reversed. The Supreme Court of the United States should consider the merits of the case and decide on the public figure, actual malice, "libelous per se", and damages issues, or as an alternative remand for a jury trial on the "libelous per se" or actual malice issues.

Respectfully submitted,

Julia McCain Lampkin-Asam

Julia McCain Lampkin-Asam, Ph.D.
Appellant, Pro Se
2243 Gorham Ave., Ft. Myers, Fla. 33907

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by certified mail to Hon. Robert Graham, Governor of the State of Florida, The Capitol, Tallhassee, Florida; Hon. Jim Smith, Attorney General, State of Florida, The Capitol, Tallahassee, Florida; Mr. Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301; Mr. Louis J. Spallone, Clerk, District Court of Appeal, Third District, 2001 S.W. 117 Ave., Miami, Florida 33165; Mr. Richard P. Brinker, Clerk, Circuit Court, Eleventh Judicial Circuit in and for Dade County, Dade County Courthouse, 73 West Flagler St., Miami, Florida 33130; and Mr. Joseph P. Averill, Attorney, representing the Miami News et al., 1237 City National Bank Building, 25 West Flagler St., Miami, Florida 33130 this 8th day of September 1982.

By: Julia McCain Lampkin-Asam

Julia McCain Lampkin-Asam, Ph.D.

APPENDIX

A-1

Exhibit A

"IN THE DISTRICT COURT OF APPEAL TO THE THIRD DISTRICT OF FLORIDA"

Case No. 80-2053

"NOTICE TO INVOKE DISCRETIONARY JURISDICTION"

JULIA McCAIN LAMPKIN-ASAM, Ph.D.
Plaintiff, Appellant, Petitioner
vs.
MIAMI DAILY NEWS, INC., a Florida Corporation, d/b/a/ The Miami News, and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING,
Defendants, Appellees, Respondents"

"NOTICE IS GIVEN that Julia McCain Lampkin-Asam, Ph.D., Plaintiff, Appellant, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered December 29, 1981 (Seven-page opinion filed December 29, 1981); rehearing denied on January 27, 1982.

"The decision (1) expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law,and (2) expressly construes a provision of the state or federal constitution."

"Respectfully submitted,
s/ Julia McCain Lampkin Asam
Julia McCain Lampkin-Asam, Ph.D.,
Pro Se
Plaintiff, Appellant, Petitioner
2243 Gorham Ave.
Ft. Myers, Florida 33907

"CERTIFICATE OF SERVICE"

"I HEREBY CERTIFY that a true and correct copy of the foregoing Notice to Invoke Discretionary Jurisdiction was sent by mail this 18th day of February, 1982 to Mr. Joseph Averill, ..."

By: s/ Julia McCain Lampkin Asam

Exhibit B

"IN THE DISTRICT COURT OF APPEAL OF
FLORIDA THIRD DISTRICT Case no. 80-2053

Julia McCain Lampkin-Asam,
Appellant,
vs.
Miami Daily News, Inc. and
Timothy Johnson,
Appellees

On Review from the Circuit Court of the
Eleventh Judicial Circuit

General Jurisdiction Division
Case no. 75-32943

BRIEF OF APPELLANT

JOEL V. LUMER
Attorney for Appellant
711 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305) 374-4331

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"ARGUMENT

I

"THE COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR DEFENDANTS MIAMI DAILY NEWS, INC. AND KING.

In order to obtain a summary judgment, the moving party must prove the non-existence of a genuine issue of material fact and must prove it conclusively. Hall v. Tolcott, 191 So 2d 40, 43 (Fla. 1966). The burden of a party moving for summary judgment is greater than that of the plaintiff at trial. Visingardi v. Tirone, 193 So 2d 601, 604 (Fla. 1966). The movant must show that the opposing party cannot prevail. Mejiah v. Rodriguez, 342 So 2d 1066,1067 (Fla. 3d DCA 1977).

In ruling on a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party. First National Bank of Tampa v. Pappas, 372 So 2d 989, 990 (Fla. 2nd DCA 1979). All doubts regarding the existence of a genuine issue of fact must be resolved against the moving party. Moore v. Japanese Gardens Mobile Estates, Inc. 365 So 2d 922, 924 (Fla. 2d DCA 1978). All reasonable inferences must be drawn in favor of the opposing party. Hall v. Tolcott, supra at 45, and all favorable issues reasonably justified from the record are liberally construed in favor of the party who is opposing the action. Davis v. 7-Eleven Food Stores, Inc., 294 So 2d 111, 112 (Fla. 1st DCA 1974).

"If the evidence raises any doubt on an issue of material fact, or is such as will permit different reasonable inferences bearing on the existence of such an issue, summary judgment is not proper. First Mortgage Investors v. Boulevard National Bank of Miami, 327 So 2d 830, 832 (Fla. 3d DCA 1976). More recently the Third

"District Court of Appeal has held:

> "If the existence of such issues or the possibility of their existence is reflected in the record, or the record ever raises the slightest doubt in this respect, the summary judgment must be reversed.
>
> Mejiah v. Rodriguez, supra at 1067-1068.

It is the appellant's position that when all of the evidence is viewed in a light most favorable to her, with all inferences drawn against the defendants and liberally construed in her favor, the "slightest doubt" standard has not been met by the parties moving for summary judgment in this case.

The modern law of defamation, where a newspaper is a defendant, begins with the case of New York Times v. Sullivan, 376 U.S. 254 (1964). In that case the Supreme Court established a federal standard that a newspaer could not be held liable for a defamation against a "public official" unless the plaintiff could prove that the defamatory statement was made with actual malice -- that is with knowledge that the statement was false or with reckless disregard of whether it was false or not. 376 U.S. at 279-280.

In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), this same "actual malice" standard was applied to persons who were deemed "public figures". The decision in Butts was announced through four opinions. Though Justice Harlan's opinion announced the decision of the court, the concurring opinion of Chief Justice Warren had the support of four other justices and established the defamation standard for public figures. That Chief Justice Warren's decision established the controlling standard was recognized by the court in Gertz v. Welch,

"418 U.S. 323, 336 (1974).

Whether a statement has been published in reckless disregard of whether it was false or not is to be decided on a case by case basis. St. Amant v. Thompson, 390 U.S. 727, 730 (1968). The St. Amant decision provides the following guidance as to when the actual malice standard could be met:

"1. Publisher is aware of the likelihood that he is circulating false information. 390 U.S. at 731.

2. A false publication was made with a high degree of awareness of probable falsity. 390 U.S. at 731.

3. Evidence of deliberate falsification. 390 U.S. at 731.

4. Defendant entertained serious doubts as to the truth of his publication. 390 U.S. at 731.

The court ruled in St. Amant that:

"The defendant in a defamation action brought by a public official, cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by a defendant, is the product of his imagination, anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. 390 U.S. at 732.

In Greenbelt Cooperative Publishing Association v. Bressler, 398 U.S. 6 (1970), the court held that the term blackmail as published had been used as "hyperbole" and

"therefore no actual malice had been shown, but went on to state that if the newspaper reports had been truncated or distorted in such a way as to extract the word "blackmail" from the context in which it was used at the public meeting reported this would be a different case. 398 U.S. at 13.

"The Supreme Court has noted, in reversing a summary judgment for a defendant, that proof of "actual malice" calls a defendant's state of mind into question and does not readily lend itself to summary disposition. Hutchinson v. Proxmire, 443 U.S. 111, 120 at fn. 9 (1979). In libel actions, Florida courts have held that summary judgment should be sparingly granted so as not to infringe upon the constitutional right to a jury trial, Axelrod v. Califano, 357 So 2d 1048, 1051 (Fla. 1st DCA 1978), and that the question of actual malice is one for a jury. Holter v. WLCY T.V., Inc., 366 So 2d 445 (Fla. 2d DCA 1978).

In Gertz v. Welch, supra at 349, the Supreme Court held that, in defamation actions by private individuals against the public media, punitive damages could not be recovered unless the proof met the New York Times standard. Citing Gertz, the decision in Cape Publications, Inc. v. Teri's Health Studio, 385 So 2d 188, 189-190 (Fla. 5th DCA 1980), held that in order to recover punitive damages the plaintiff would have to prove malice, bad faith or reckless disregard for the truth or falsity of the story.

In Cape Publications, Inc. v. Adams, 336 So 2d 1197 (Fla. 4th DCA 1976), the reporter knew that his source had a feud with the subject of his story and was thus on notice as to the source's questionable credibility. This was one of the bases upon which the appellate court found

"sufficient evidence of actual malice and affirmed a jury verdict in favor of a public official. In reversing a directed verdict for the defendants in a libel action by a public official, the court in Holter v. WLCY T.V., Inc., supra at 453, stated that the evasiveness and contradictions by a reporter knew that his statements were false. The court also indicated that portrayal of an existing situation in an extremely misleading fashion was grounds for finding actual malice. 366 So 2d at 453-454, and that repetition of another's words does not release one of responsibility if the reporter knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his report. 366 So 2d at 454. "...More significantly, the Supreme Court has told us that a fabricated story is not protected by the New York Times rule. King quoted Dunning as saying that Asam was very emotionally disturbed, has no qualifications to do cancer research and that Dunning suspected that Asam received her Ph.D. because a university was trying to get rid of her. Read in the light most favorable to the Plaintiff, Dunning denied having made these statements to King. There is ample evidence in the record from which a jury could conclude that Dunning was telling the truth, that King was lying and that the quotes published by King were fabrications. Given the "slightest doubt" standard, the issue of whether King had lied and created the quotes as a product of her imagination should be left to a jury.

We are concerned with an issue of the reporter's state of mind. The testimony of Dunning conflicts with the testimony of King in many respects. At the least, a

"reconciliation of the testimony of Dunning and King would require the admission that King had taken Dunning's statements out of the context in which they were used, in order to present a situation that was extremely misleading. The courts of this state and the United States Supreme Court have instructed us that these issues are not to be resolved by a summary judgment, but are to be decided by a jury as the finder of fact.

"...The plaintiff in the instant case did not make policy determinations that were traditionally channeled through formal political institutions. She was not intimately involved in the resolution of important public questions. Her position does not invite public scrutiny and discussion entirely apart from the scrutiny and discussion occasioned by the particular charges. She does not hold an "influential role in ordering society." Asam did not have regular and continuing access to the media or any of the accouterments of having become a public figure. Most importantly, her views and actions with respect to a public issue or event were not as much concern to the citizens as the attitudes and behavior of public officials with respect to the same issues and events.

"As shown from the Firestone and Wolston decisions, extended coverage in the press, the holding of several press conferences, reports by the FBI and prominence in local society are not enough to make one a public figure. As shown by the Hutchinson decision, public figure status is not obtained by publishing scientific articles, receiving public grant money, active solicitation of other public grants, local press coverage of one's scientific activities and public interest in the precise activities for which one received funds. Under these

standards, the plaintiff in the instant case is not a public figure for purposes of the law of defamation.

CONCLUSION

"This court should reverse the final summary judgment entered by the lower court and remand the case for a trial by jury on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant was furnished by mail this 6th day of February, 1981 to Joseph Averill, 1237 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

s/_____

JOEL V. LUMER
Attorney for Appellant
711 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305)374-4331

Exhibit C

"IN THE DISTRICT COURT OF APPEAL OF

FLORIDA THIRD DISTRICT Case no. 80-2053

Julia McCain Lampkin-Asam
Appellant

vs.

Miami Daily News, Inc. and
Timothy Johnson,
Appellees

On Review from the Circuit Court of the
Eleventh Judicial Circuit

General Jurisdiction Division
Case no. 75-32943

REPLY BRIEF OF APPELLANT

JOEL V. LUMER
Attorney for Appellant
711 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Tel. 305-374-4340

...

"The summary judgment rule set forth in Time, Inc. v. McLaney, 406 F. 2d 565, (5th Cir 1969), is that federal courts are reluctant to deprive a litigant of the opportunity to present his case to the jury and that upon a motion for summary judgment all of the facts and inferences to be drawn therefrom are to be construed in favor of the party against whom judgment is sought. 496 F. 2d at 571.

Defendants contend that the plaintiff has failed to raise a genuine issue of fact concerning the publisher's state of mind under the rule set forth in St. Amant v.

Thompson, 390 U.S. 727 (1968). The St. Amant opinion makes it clear that this state of mind requirement will be met where a story is fabricated by a defendant. 390 US at 732.

The statements that are at issue in this case are alleged quotes from Dr. Wilhelmina Dunning about the plaintiff. At her deposition Dr. Dunning said (in addition to the passage quoted at page 6 of the initial Brief of Appellant).

> "I certainly did not say, "She may have gotten her Doctorate from George Washington University," because I knew she had. (R 1251)

At Dr. Dunning's deposition the question was asked:

> "Prior to October 1, 1973, and for purposes of simply advising you of our chronology, the article, again, is October 23rd of 1973.
>
> "Had you had any telephone conversation or any form of communication whatsoever with Terry Johnson King? (R 1253)

and Dr. Dunning replied:

> "Not that I recall. (R 1253)

"The following colloquy took place at the deposition of Dr. Dunning:

"Q. Do you recall a time prior to October 23, 1973, when you had any communication or correspondence with Terry Johnson King?

"A. I do not recall it.

"Q. Do you recall having received a telephone call from any individual who identified themselves as a reporter or employee of The Miami News at any time prior to October 23, 1973?

"A. No.

"Q. Do you now understand and believe such a telephone call to have been made to you prior to October 23, 1973?

"A I do not.

"Q. Had The Miami News or anyone identifying themselves as being associated with or employed by The Miami News ever contacted you for any purpose whatsoever prior to October 23, 1973?

"A Oh, yes. They had written several articles about me in years before.

"Q And you recall having been contacted then?

"A And, usually, when they did contact me, they submitted the article for my approval before publishing it.

" "(R 1254)

"Dr. Dunning's testimony can support a jury finding that she never had a conversation with King. Plaintiff assets that the alleged quotes from Dr. Dunning, which are the essence of the defamatory matter, were fabricated by the defendants. Fabrication is sufficient to show that the defendants knew what they were printing was false." (Emphasis added.)